



LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 370

[Docket No. RM 2008-7]

Notice and Recordkeeping for Use of Sound Recordings under Statutory License

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule; Affirmation.

SUMMARY: The Copyright Royalty Judges affirm adoption of the final regulation for filing notice of use and the delivery of records of use of sound recordings under two statutory licenses of the Copyright Act. The purpose of this affirmation is to remove any doubt about the effectiveness of the final regulation in light of a ruling by the United States Court of Appeals for the District of Columbia Circuit regarding the constitutionality of the manner in which the Copyright Royalty Judges were appointed.

DATES: *Effective Date:* [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor, by telephone at (202) 707-7658 or e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

On October 6, 2006, the Copyright Royalty Judges (Judges) issued interim regulations published in the **Federal Register** for the delivery and format of reports of use of sound recordings for the statutory licenses set forth in sections 112 and 114 of the Copyright Act. 71 FR 59010. The goal of those interim regulations was to establish format and delivery requirements for reports of use so that royalty payments to copyright owners pursuant to the

section 112 and 114 licenses could be made from April 1, 2004, forward based upon actual data on the sound recordings transmitted by digital audio services. During the period after the Judges issued the interim regulations, the Judges monitored the operation of these regulations as well as developments in recordkeeping requirements agreed upon by parties to various settlements relating to the use of the section 112 and 114 licenses.

On December 30, 2008, the Judges published a notice of proposed rulemaking (NPRM) setting forth proposed revisions to the interim regulations adopted in October 2006. 73 FR 79727. The most significant revision proposed by the Judges was to expand the reporting period to implement year-round census reporting. Further, on April 8, 2009, the Judges published a notice of inquiry (NOI) to obtain additional information concerning the likely costs and benefits stemming from the adoption of the proposed census reporting provision as well as information on any alternatives to the proposal that might accomplish the same goals as the proposal in a less burdensome way, particularly with respect to small entities. 74 FR 15901.

On October 13, 2009, the Judges published a final rule amending the interim regulations and establishing requirements for census reporting for all but those broadcasters who pay no more than the minimum fee for their use of the license. 74 FR 52418. The Judges adopted the regulations substantially as proposed in the NPRM with minor modifications in response to comments received. The final regulations established requirements by which copyright owners may receive reasonable notice of the use of their sound recordings and under which records of use were to be kept and made available by entities of all sizes performing sound recordings. *See, e.g.*, 17 U.S.C. 114 (f)(4)(A). As with the interim regulations adopted in 2006, the final regulations adopted in 2009 represented baseline requirements. In other words, digital audio services remained free to negotiate other formats and technical standards for data maintenance

and delivery and to use those in lieu of regulations adopted by the Judges, upon agreement with the Collective. The Judges indicated that they had no intention of codifying these negotiated variances in the future unless and until they come into such standardized use as to effectively supersede the existing regulations.

On October 28, 2009, College Broadcasters, Inc. (CBI), American Council on Education and Intercollegiate Broadcasting Systems, Inc. (collectively, Petitioners) made a motion with the Judges for clarification with respect to one issue raised by the final regulation. Petitioners noted that the final regulation exempted minimum-fee webcasters that are FCC-licensed broadcasters from the census reporting requirement, but did not appear to exempt minimum-fee educational stations that are not FCC-licensed broadcasters from the same requirement. Petitioners asked the Judges to “clarify” that the exemption extended to minimum fee unlicensed educational stations.

On November 12, 2009, before the Judges ruled on this motion, CBI filed a Petition for Review of the final regulation with the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) (Appeal No. 09-1276). This appeal was held in abeyance pending the outcome of an appeal of the Judges’ final determination in Docket No. 2009-1 CRB Webcasting III. The D.C. Circuit concluded that appeal on July 6, 2012, holding that the manner by which the Judges were appointed was unconstitutional, and dictating a statutory remedy. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340-41 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (2013). The D.C. Circuit remanded the final determination to the Judges,¹ and also transferred CBI’s appeal to the United States District Court for the District of Columbia. *See Order* in Appeal No. 09-1276 (D.C. Cir. October 28, 2013).

¹ The Judges issued their Initial Determination on Remand in the *Webcasting III* proceeding, *see Determination After Remand of Rates and Terms for Royalty Years 2011-2015*, Docket No. 2009-1 CRB Webcasting III (Jan. 9, 2014).

In light of the foregoing proceedings, the Judges recognize the need to clarify the effectiveness of the final regulation. Consequently, the Judges performed a *de novo* review of the comments underlying the final regulation and affirm the adoption of this regulation as published at 74 FR 52418 on October 11, 2009, in its entirety and without change (including the reasons set forth in the preamble thereto), thereby removing any doubt as to the effectiveness of the final regulation. Such affirmation also ensures the continuous effectiveness of the rules concerning notice and recordkeeping for users of copyrighted sound recordings.

On October 21, 2013, the Judges received a petition from SoundExchange seeking modifications to the notice and recordkeeping final regulation. The Judges will address the Petitioner's motion for clarification, as well as SoundExchange's petition, in a separate notice also published today in the **Federal Register**.

List of Subjects in 37 CFR Part 370

Copyright, Sound recordings.

Final Regulation

For the reasons set forth in the foregoing preamble, the Copyright Royalty Judges affirm adoption of the final rule revising 37 CFR part 370, which was published at 74 FR 52418 on October 13, 2009, without change.

Dated: February 20, 2014

Suzanne M. Barnett,
Chief U.S. Copyright Royalty Judge.

Approved by:

James H. Billington,
Librarian of Congress.

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